

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES TATE, individually, and)
on behalf of all other)
similarly situated)

Plaintiff,)

v.)

U.S. BANK NATIONAL ASSOCIA-)
TION, dba U.S. BANK,)

Defendants.)

No. CV-06-1204-HU

FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff James Tate brings this wage claim action against
defendant U.S. Bank. Plaintiff filed the action in Multnomah

1 - FINDINGS & RECOMMENDATION

1 County Circuit Court. Defendant removed the action to this Court.
2 Plaintiff moves to remand. I recommend that plaintiff's motion be
3 granted. Plaintiff also moves to strike the declaration of John
4 Burnside filed by defendant in opposition to the motion to remand.
5 I deny the motion to strike as moot.

6 BACKGROUND

7 The state court Complaint is brought as a class action under
8 Oregon law. Thus, plaintiff is named individually and on behalf of
9 all other persons similarly situated. Exh. 1 to Notice of Removal
10 at p. 2. In the first claim, plaintiff alleges that by
11 misclassifying certain Sales and Service Manager (SSM) employees as
12 exempt from overtime, defendant violated Oregon Revised Statute §
13 (O.R.S.) 653.261 and Oregon Administrative Rule (OAR) 839-020-0030,
14 which provide for 1½ times the employee's hourly wage when the
15 employee works more than 40 hours in a week. Id. at ¶¶ 26, 27, 28.
16 Plaintiff alleges that defendant's conduct was willful. Id. at ¶
17 29. Plaintiff seeks the unpaid overtime wages, a civil penalty
18 pursuant to O.R.S. 653.055, and attorney's fees. Id. at ¶ 30.
19 This first claim applies to SSMs who worked for defendant "[w]ithin
20 the two years prior to the date of filing of this complaint." Exh.
21 1 to Notice of Removal at ¶¶ 26, 28.

22 The second claim applies to those members of the "SSM class"
23 whose employment with defendant ended within three years prior to
24 the filing of the action. Id. at ¶ 32. The claim is for late
25 payment of wages under O.R.S. 652.140. That statute requires that
26 upon discharge or termination, the employer must pay the employee
27 all wages owing within certain specified periods of time. Failure
28 to do so triggers a penalty under O.R.S. 652.150. Plaintiff also

1 seeks attorney's fees in connection with this claim.

2 Notably, in the caption of the state court Complaint,
3 plaintiff alleges that "THE AGGREGATE OF CLAIMS DOES NOT EXCEED 5
4 MILLION DOLLARS." Id. at p. 2. And, in paragraph 5 of the
5 Complaint, plaintiff pleads that "[t]he aggregate total of the
6 claims pled herein do not exceed five million dollars." Id. at ¶
7 5. Additionally, the prayer of the Complaint states that
8 "[p]laintiff and members of each class request the Court award such
9 damages, in total less than five million dollars," Compl. at
10 p. 9. In the Notice of Removal, however, defendant contends that
11 the amount in controversy exceeds \$5 million. Notice of Removal at
12 ¶¶ 12-26. According to defendant, the total amount in controversy,
13 without considering attorney's fees, is over \$14.5 million. Id. at
14 ¶ 26.

15 DISCUSSION

16 The Class Action Fairness Act of 2005 (CAFA), grants federal
17 jurisdiction over any civil action where (1) the amount in
18 controversy exceeds \$5 million; (2) the number of members of all
19 proposed plaintiff classes in the aggregate is one hundred or
20 greater; and (3) any member of a class of plaintiffs is a citizen
21 of a state different from any defendant. 28 U.S.C. § 1332(d). The
22 issue in this case concerns the amount in controversy requirement.

23 Under CAFA, the burden of establishing removal jurisdiction
24 lies with the proponent of federal jurisdiction. Abrego Abrego v.
25 The Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006). This
26 includes "any applicable amount in controversy requirement." Id.
27 at 682-83.

28 Generally, if a complaint does not specify the amount of

1 damages sought, the removing defendant must prove by a
2 preponderance of the evidence that the amount in controversy
3 requirement has been met. Id. at 683. In the instant case,
4 defendant argues in opposition to plaintiff's motion to remand,
5 that plaintiff's complaint does not allege a specific dollar amount
6 because it expresses only that "the aggregate of claims does not
7 exceed 5 million dollars" which defendant argues is nothing more
8 than a statement that the \$5 million jurisdictional threshold is
9 not met.

10 Defendant, relying on statements made by Burnside in the
11 declaration plaintiff seeks to strike, contends that based on the
12 number of SSMS in Oregon during the two-year period preceding the
13 filing of the Complaint, the average hourly wage of these SSMS,
14 their pay schedule, and the fact that during the two-year period
15 there were 3,300 combined pay periods for the SSMS, the penalty
16 wage claim alone would exceed the \$5 million jurisdictional
17 threshold. Defendant also relies on evidence submitted in a
18 related case pending in this Court, McElmurry v. US Bank Nat'l
19 Ass'n, No. CV-04-642-HU, for facts regarding the average number of
20 hours SSMS work per week and plaintiff's valuation of the SSM
21 claims in the McElmurry case.

22 Plaintiff contends that the amount in controversy is, in fact,
23 specified in the Complaint, and that it is less than \$5 million.
24 Plaintiff also argues that a recent decision by Judge Haggerty
25 precludes defendant from making the argument it makes here.

26 In Lowdermilk v. U.S. Bank Nat'l Ass'n, No. CV-06-592-HA,
27 Order of Remand (D. Or. Aug. 16, 2006), the plaintiff filed a class
28 action wage complaint in state court, bringing claims under O.R.S.

1 652.140, 652.150, and 653.055, for unpaid wages, late payment of
2 wages upon termination, and penalties. Id. at p. 2. The defendant
3 removed the action to this Court under CAFA. Id. The plaintiff
4 sought remand on the basis that there was no minimal diversity of
5 citizenship and that the total amount in controversy did not exceed
6 \$5 million. Id.

7 After concluding that the defendant had met its burden of
8 alleging minimal diversity of citizenship, id. at p. 3, Judge
9 Haggerty examined the amount in controversy requirement. First, he
10 noted that in ordinary diversity cases, the appropriate procedure
11 for determining the amount in controversy on removal is to
12 initially consider whether the amount is "facially apparent" on the
13 complaint and if not, to then consider the facts in the removal
14 petition. Id. at p. 4. He noted, relying on Abrego Abrego, that
15 the Ninth Circuit had accepted that framework for cases under CAFA.
16 Id.

17 Next, he explained that "[h]ere, plaintiff specified in her
18 Complaint that the 'aggregate total of the claims pled herein do
19 not exceed five million dollars.'" Id. (quoting Compl. ¶ 4). This
20 allegation is identical to that alleged in paragraph 5 of the
21 instant case. Judge Haggerty then concluded that "[t]he amount in
22 controversy is facially apparent, and is insufficient to establish
23 federal jurisdiction." Id.

24 Second, Judge Haggerty rejected the defendant's arguments that
25 the court should disregard the damages prayer. Judge Haggerty
26 noted whether a complaint that alleges an amount less than the
27 jurisdictional amount defeats federal jurisdiction in the context
28 of CAFA had not yet been decided in the Ninth Circuit. Id. (citing

1 Abrego Abrego, 443 F.3d at 683 n.8 ("If the Complaint alleges
2 damages of less than the jurisdictional amount, 'more difficult
3 problems are present,' as to which there is no binding precedent in
4 this circuit.") (quoting 14C Charles Alan Wright, Arthur R. Miller
5 & Edward H. Cooper, Federal Practice & Procedure § 3725 at 84)).

6 Judge Haggerty then discussed that the "more difficult
7 problems" occur outside the CAFA context. Id. He explained that
8 a concern that a plaintiff could increase the damages alleged after
9 the period for removal had expired is absent under CAFA because the
10 statute eliminates the one-year limitation for removing a case to
11 federal court based on diversity jurisdiction. Id. at p. 5 (citing
12 28 U.S.C. § 1453(b)). Rather, if a plaintiff attempts to increase
13 the amount in controversy, the defendant can then remove the case
14 to federal court at that time. Id.

15 Thus, he concluded that the plaintiff was bound by the
16 allegation that the amount in controversy would not exceed \$5
17 million and that if the plaintiff attempted to increase the damages
18 sought, the case could then be removed to federal court. Id.
19 Therefore, he noted, federal jurisdiction was inappropriate unless
20 the plaintiff's prayer is determined to have been made in bad
21 faith. Id.

22 Judge Haggerty stated that a plaintiff's request for damages
23 is construed as having been made in good faith and that the court
24 may not disregard the plaintiff's damages prayer even if there are
25 circumstances suggesting that the plaintiff might be manipulating
26 jurisdictional requirements. Id. at p. 6 (citing Shaw v. Dow
27 Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993), Corlew v. Denny's
28 Rest., Inc., 983 F. Supp. 878, 880 (E.D. Mo. 1997)). He declined

1 to disbelieve plaintiff's valuation of her case. Id. Thus, he
2 granted the motion to remand.

3 I do not need to apply a formal issue preclusion analysis as
4 plaintiff urges because I find Judge Haggerty's reasoning in
5 Lowdermilk to be thorough and sound. Accordingly, I adopt it in
6 this case.

7 Defendant contends that Lowdermilk is distinguishable because
8 the instant case contains an allegation under the first claim for
9 unpaid overtime that requires a penalty payment for each pay
10 period. Compl. at ¶ 13 (" . . . plus 30 days of penalty wages for
11 each pay period overtime wages were not paid when due.") (emphasis
12 added). Defendant asserts that this claim was absent in
13 Lowdermilk.

14 Defendant's argument misses the mark. The conclusion Judge
15 Haggerty reached in Lowdermilk, as I understand his reasoning, was
16 based on the fact that the plaintiff's allegation that the
17 "aggregate total of the claims plead herein do not exceed five
18 million dollars," was a specific expression of the amount of
19 damages sought, apparent on the face of the complaint, and thus,
20 there was no basis to go behind that allegation and attempt to
21 compute what damages might be theoretically possible based on the
22 claims at issue in the case.

23 The same principle applies here. Plaintiff has limited
24 himself by his specific expression that the claims do not exceed \$5
25 million in damages.¹ Thus, as in Lowdermilk, the amount in

27 ¹ Under Oregon law, pleadings must specify the amount of
28 money damages the party seeks. Or. R. Civ. P. 18B. A verdict
must not exceed the amount alleged and prayed for in the

controversy is facially apparent and is insufficient to establish federal jurisdiction. Moreover, as Judge Haggerty explained, "a plaintiff may evade federal court simply by asking for less than the jurisdictional amount, so long as the plaintiff, should she prevail, isn't legally certain to recover more." Lowdermilk, Ord. at pp. 6-7 (quoting Shaw, 994 F.2d at 366. As he further stated,

[a]ccordingly, plaintiff's prayer is not considered made in bad faith even if it is asserted solely to avoid federal jurisdiction. Here, if plaintiff prevails on her claims in state court, she cannot recover more than her prayer of five million dollars, and, as discussed above, if she increases that prayer her claims will then be subject to removal. 28 U.S.C. § 1453(b).

Id. at p. 7

Judge Haggerty's statements in Lowdermilk are equally applicable here. Additionally, because I resolve the motion to remand in plaintiff's favor without considering the motion to strike, I deny the motion to strike as moot.

CONCLUSION

I recommend that plaintiff's motion to remand (#4) be granted, and that this case be remanded back to state court. I deny plaintiff's motion to strike (#12) as moot.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due February 6, 2007. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

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complaint. Lovejoy Specialty Hosp., Inc. v. Advocates for Life, Inc., 121 Or. App. 160, 167, 855 P.2d 159, 163 (1993) (citing Wiebe v. Seely, 215 Or. 331, 357, 335 P.2d 379 (1959)).

1 If objections are filed, a response to the objections is due
2 February 20, 2007. and the review of the Findings and
3 Recommendation will go under advisement on that date.

4 IT IS SO ORDERED.

5 Dated this 22nd day of January, 2007.

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8 /s/ Dennis James Hubel
9 Dennis James Hubel
United States Magistrate Judge
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